

EC LAW ON STATE AID LEGAL FRAMEWORK, CASE LAW AND THE STORY IN THE ALITALIA STATE LOAN CASE

by

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The EC Treaty does not include any definition of State aid. Nevertheless, the Commission and the European Courts have construed the definition so that we should regard State aid as any advantage granted directly or indirectly through State resources.

*The ECJ has e.g. in *Belgium v Commission* stated that aid is 'defined in regards to its effect, and not its aim or form'.¹*

Four cumulative elements must be shown to satisfy the test for State aid which mean that the measure must be specific, it must grant an advantage to an undertaking, the aid must come from State resources, the advantage must distort competition and have an effect on Trade between Member States.

Under the first criterion (the measure must be specific) we should understand general economic policy norms (growth- and stability-oriented macroeconomic policies which should sustain economic growth in the short term, create the possibility for growth in the medium-term and the capacity for structural changes in longer-term).²

*About the second criterion (advantage to an undertaking) was decided in the *Case Denkavit*³ where was held that the advantage must be granted for no consideration or countervailing benefit. Here, the hypothetical investor test must be applied in which the state aid is compared against the hypothetical case of a private undertaking functioning in a market economy.*

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¹ Case C-75/97 *Belgium v Commission* [1999] ECR I-3671.

² 2001/483/EC of 15 June 2001, Council Recommendation on the Broad Guidelines of the Economic Policies of the Member States and the Community.

³ Case 61/79 *Amministrazione delle Finanze dello Stato v Denkavit Italiana* [1980] ECR 1205.

Third criterion (come from State resources) mean that the benefiting must come directly (e.g. direct grant aid) or indirectly (e.g. loss of tax revenue).

*Last but not least, (distortion of competition) by breaching of Article 87 EC the benefit must distort or threaten competition by favouring certain undertakings (even small amounts of aid would distort competition as it was decided in *Vlaams Gewest v Commission*).⁴*

Contrary to CFI, the Commission in Notice on the de minimis rule for State aid (Commission Regulation (EC) No 1998/2006, OJ L 379 of 28. 12. 2006) held that small amounts of aid would not fall under State aid Rules. The recapitalisation of Alitalia was authorized according to State aid legislation in 2001. It is clear that government may not give financial preference to individual companies unless they are acting in accordance with market economy investor principles.

KEYWORDS

EU Law, state aid, ECJ case law

1. GENERAL PROHIBITION AGAINST STATE AID

Article 87 (1) EC introduces a general prohibition of State aid in EU law. Exemptions to this prohibition are provided in Article 87 (2) and (3) EC Treaty. To be caught by the prohibition, the Court establishes four conditions to escape being termed as State aid under the EC law: there must be a financial intervention by State or State resources, this intervention must bring an advantage on the beneficiary, the intervention must distort or threaten to distort competition and the intervention must be able to affect trade between Member States.

Article 87 EC Treaty

(1) *Save as otherwise provided in this Treaty, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market.*

(2) *The following shall be compatible with the common market:*

(a) *— aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;*

⁴ Case T-215/95 *Vlaams Gewest v. Commission* [1998] ECR II-717.

(b) — aid to make good the damage caused by natural disasters or exceptional occurrences;

(c) — aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, insofar as such aid is required in order to compensate for the economic disadvantages caused by that division.

(3) The following may be considered to be compatible with the common market:

(a) — to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment;

(b) — to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;

(c) — to facilitate the development of certain economic activities or of certain economic areas, where such aid does not adversely affect trading conditions to an extent contrary to the common interest;

(d) — to promote culture and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest;

(e) — such other categories of aid as may be specified by decision of the Council acting by a qualified majority on a proposal from the Commission.

1.1 MEANING OF STATE AID

When an undertaking has received an economic advantage a question is needed: is the State aid involved? This was broadly seen in the famous Altmark⁵ case the ECJ has solved a question of when financial support constitutes an economic advantage and is therefore caught by Article 87 (1) EC Treaty (more to this judgement will be discussed in paragraph 6 of this paper).

⁵ Case C-280/00 *Altmark* (Reference for a preliminary ruling from the Bundesverwaltungsgericht): *Altmark Trans GmbH, Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* of 24 July 2003.

2. NOTIFICATION REQUIREMENTS UNDER ARTICLE 87 (1) EC OF THE TREATY

2.1. TRANSFER OF STATE RESOURCES

The ECJ has in many cases decided that only advantages granted directly or indirectly through state resources can be considered as a State aid under EC law (*PreussenElektra AG, Schleswig AG*).⁶ Contrary to this public undertakings are capable of granting State aid (*Steinike & Weinlig*).⁷ In other important decision has the ECJ held that if a state which held a 50 % of the shares of a private company, where it has the power to approve tariffs imposed by the company is enough to prove the existence of a transfer of state resources (*Van der Kooy*).⁸ As an example of this first requirement we could name financial transfer from national, regional or local authorities, public banks etc.

2.2. ECONOMIC ADVANTAGE

Favouring, according to this concept means, that the undertaking would not have been received it in the normal course of business (granting payment or benefits with no appropriate work by the benefiting company). E.g. financial support, guarantees and securities, selling and buying not at market price or exclusions from laws can be seen as examples of an economic advantage.

2.3. SELECTIVITY

The term selectivity meant that the aid favours certain undertakings or the production of certain goods. General measures to promote economic activity are not State aid as in principle all market players will profit.

2.4. EFFECT ON COMPETITION AND TRADE

The company must be involved in an economic activity which is able to affect trade between Member States. The ECJ has held in several cases that the Commission is not required to carry out full detailed economic analyses for determination of respective market shares (*Vlaams Gewest v. Commission*),⁹ what mean that Commission is not required to demonstrate the real effect of illegal aid on competition and trade between Member States.

⁶ Case C-379/98, *PreussenElektra AG v. Schleswig AG* [2000] E.C.R. I-2099.

⁷ Case C-78/76, *Steinike & Weinlig* [1977] ECR 595.

⁸ Joined Cases 67, 68 and 70/85 *Van der Kooy BV and others v. Commission* [1988] ECR 219.

⁹ Case T-214/95, *Vlaams Gewest v. Commission*, [1997] ECR II-717.

2.5. THE DE MINIMIS RULE IN EC LAW

(FORMER NO 69/2001 AND NEW THE RULE NO 1998/2006)

Originally, the de minimis policy which was in particular focused on small and medium sized companies (SMEs) was launched by the European Commission in 1992. Subsidies with an amount which is smaller than 100.000 € do not constitute "State Aid" under the conditions of Article 87 EC Treaty.¹⁰

It is important that the aid granted to an undertaking does not overlap the period of 3 years (Commission Regulation No. 69/2001). This Regulation was (after its expiration on December 2006) replaced with the Commission Regulation No. 1998/2006 where the maximum amount of aid is limited to 200.000 € over a timetable of three financial years (as an example, by the road transport sector the amount is reduced to 100.000 €).

3. EXEMPTIONS UNDER ARTICLE 87 (2) EC

STATE AIDS WHICH SHALL BE COMPATIBLE

According to Article 87(2) EC Treaty, the following shall be compatible with the common market:

- (a) aid having a social character, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned; (e.g. tax relief to consumers purchasing cars fitted with pollution reduction devices, state purchases food from individual companies in order to distribute it below price to individuals in need etc.)
- (b) aid to make good the damage caused by natural disasters (e.g. floods, earthquakes, etc.) or exceptional occurrences (e.g. war, industrial accidents of large dimension etc.);
- (c) aid granted to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany, insofar as such aid is required in order to compensate for the economic disadvantages caused by that division (application of the so called 'German clause' has been controversial since the reunification of Germany in 1990).

The new Treaty establishing the European Community introduces following provision to the Article 87 (2) (c): Five years after the entry into force of the Treaty amending the Treaty on European Union and the Treaty establishing the European Community, the Council, acting on a proposal from the Commission, may adopt a decision repealing this point.¹¹

¹⁰ Karas Viliam, Králik Andrej: *Európske právo*, Iura Edition, Trnava 2004.

¹¹ Peers Steve: *EU Reform Treaty Analysis* no. 3.3, Revised text of Part Three, Titles I to VI of the Treaty establishing the European Community (TEC): Internal Market and competition, University of Essex 2007.

4. ARTICLE 87 (3) EC

STATE AIDS WHICH MAY BE COMPATIBLE

Illegal state aid covers subsidies in any form including tax advantages; credit guarantees however, some types of state aid are acceptable. EC law permits aid falling within categories specified in Article 87 (3) to be compatible with the common market as follows (of high importance are in particular):¹²

- (a) State aid to promote the development of “areas where the standard of living is abnormally low or where there is serious underemployment”, this means regions where GDP (gross domestic product) is less than 75% of the EU average.¹³ This aid concerns only areas, where the economic situation is exceedingly unfavourable in relation to the EU as a whole.
- (b) This concerns areas which are disadvantaged in relation to the national average. 3 criteria by the regions which must be included in the regional map must be met:
- lower standard of living than national level,
 - low density population,
 - eligible to structural funds.

The European Commission assigns a population ceiling value to each Member State (taking into consideration, in particular unemployment and GDP). About the other provision to this article it has been mentioned at the beginning of this paper.

5. SERVICES OF GENERAL ECONOMIC

INTEREST IN EC LAW (ARTICLE 86 (2) OF THE TREATY)

The definition of undertakings has been widely interpreted that it includes any legal or natural person engaged in some form of economic or commercial activity (e.g. companies, partnerships, non profit-making organizations etc.).¹⁴ It is not necessary that the activity be pursued with a view to profit. On the contrary state households are not understood as undertakings.

Article 86 EC Treaty

(2) Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be

¹² Europa-Recht, Beck-Texte im dtv, 20. Auflage 2005, p 65.

¹³ Tichý, L., Arnold, R., Svoboda, P., Zemánek, J., Král, R.: *Evropské právo*, Praha 1999, p. 497 and follows.

¹⁴ Case T- 319/99 FENIN v Commission [2003] ECR II-357 or Case, C-244/94 Fédération Française des Sociétés d'Assurance, Société Paternelle-Vie, Union des Assurances de Paris-Vie and Caisse d'Assurance et de Prévoyance Mutuelle des Agriculteurs v Ministère de l'Agriculture et de la Pêche [1995] ECR I-4013.

subject to the rules contained in this Treaty, in particular to the rules on competition, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.

An undertaking may be entrusted through licence governed by public law or the grant of a concession as it was decided in *Commission v French Republic*.¹⁵

“Services of General Economic Interest (SGEI) are defined in European Competition law as economic activities that public authorities identify as being of particular importance to citizens and that would not be supplied (or would be supplied under different conditions) if there were no public intervention. In this Opinion we discuss some basic economic principles governing the treatment of SGEI.”¹⁶ To be a service of general economic interests the EC and ECJ have stated that the service must be widely available.

The ECJ has ruled that public and private undertakings, carrying out economic activities, are encompassed by the provision.¹⁷

Once the aid was characterised, the Commission went on to assess whether the funding measures could qualify for the derogation set forth by Article 86(2) EC Treaty.

6. CASE LAW – ALTMARK CASE

C-280/00 JUDGEMENT OF 24TH JULY 2003

In *Altmark*, the ECJ has specifying the conditions under which the compensation for public services does not contain aid laid down in Article 87 (1) EC. Hereby, the ECJ has confirmed its earlier judgement in *Ferring*.¹⁸ According to these two cases, four condition must be fulfilled if the compensation for public services was not be considered as an aid:

- The recipient undertaking must actually have public service obligations to discharge and those obligations must be clearly defined,
- The parameters on the basis of which the compensation is calculated must be established both in advance and in an objective and transparent manner,

¹⁵ Case C-159/94 and C- 160/94 *EC Commission v the French Republic* [1997] ECR I-05815.

¹⁶ Services of General Economic Interest, Opinion Prepared by the State Aid Group of EAGCP, June 29 2006

¹⁷ Craig, Paul and de Búrca, Gráinne: “EU Law ”, 2nd edition., Oxford, 1998, p. 1070.

¹⁸ Case C-53/00 *Ferring* [2001] ECR I-9067.

- The compensation cannot exceed what is necessary to cover all or part of the costs incurred in the discharge of the public service obligations, taking into account the relevant receipts and a reasonable profit,
- Where the undertaking is not chosen in a public procurement procedure, the level of compensation must be determined by a comparison with an analysis of the costs that a typical transport undertaking would incur (taking into account the receipts and a reasonable profit from discharging the obligations).¹⁹

EU member states need not notify such compensation to the European Commission. Where these four criteria are not met, public service compensation does constitute state aid according to the EC law. Through this case the ECJ has brought considerable clarification to the financing of public services in the EU.

7. ALITALIA

LINEE AEREE ITALIANE S.p.A. (FACTS AND FIGURES)

Linee Aeree Italiane S.p.A. (Alitalia), which is owned by the Ministero dell'Economia e delle Finanze (formerly Italian Ministry of Treasury) (49 %), other shareholder (49 %) and the company Air France KLM (2 %), is according to Reuters under 25 world's biggest passenger airline by fleet size. The company was founded in 1946 as Alitalia-Aerolinee Internazionali Italiane (since 1957 Alitalia-Linee Aeree Italiane S.p.A.) with only one year of profit (1998).

Between 1999 and 2008 Alitalia has reported only losses in the high of € 3,7 billion although the Italian government and other organisations have invested more than € 2,5 billion since 2002. In 2004 the European Commission has authorised a rescue aid (€ 400 million with repayment period which must not exceed 12 months, the amount is limited to manage the company, liquidation or restructuring plan will be send within 6 months of authorisation of the payment) for Alitalia.

In May 2008 has the company received a government loan of € 300 million (as an asset on its books). After that, the European Commission began an investigation of the government loan whether violates rules on state aid.

Several attempts to make Alitalia a profit making company have been made (unsuccessfully) so in September 2008 the company filed for bankruptcy.

¹⁹ Case C-280/00 *Altmark* (Reference for a preliminary ruling from the Bundesverwaltungsgericht): *Altmark Trans GmbH, Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* of 24 July 2003.

In September 2008, Antonio Tajani, Vice-President responsible for transport policy by the European Commission has held a speech in Brussels (Belgium) to the rescue operation by merging Alitalia with Air One (Italian second biggest airline) follows "The plan is valuable concerning the participation of private actors, favouring the market and competition." This means that the merged company should be part in two.

A group of Italian investors, CAI (Italian Air Company), which is led by Roberto Colaninno (President of Piaggio company) has agreed to push € 1 billion into the bankrupt company and merge it with Air One. The rival, low cost company Ryanair, has claimed for the European Commission that Italian, French as well as German governments have granted illegal state aids although the EC has never taken action (more to this can be seen at the close to this paper).²⁰

In January 2009 the European Low Fares Airline Association (ELFAA) submitted a formal complaint to the European Commission against unlawful state aid provided to Alitalia and its successor Compagnia Aerea Italiana S.p.A. (CAI). With the 'Save Alitalia Decree, which could (according to ELFAA) distort the competition in the EU air transport market, CAI/Alitalia will benefit from the state aid over a seven-year period.²¹

7.1. ALITALIA STATE AIDS

ADMISSIBILITY IN THE CASE T-301/01²²

In the period 2006-2010 was by Alitalia adopted an restructuring plan in the high of 2750 billion ITL which should have been paid in three instalments which was approved by the European Commission that the State aid was in accordance with the common market (Decision 97/789/EC). One year later, the Court of First Instance (CFI) has annulled the Commission decision because of not to take account of the adjustments (Case T-296/97 *Alitalia v Commission*). In 2007 the Commission has adopted a new decision where the State aid granting in form of a capital injection compatible with the common market (Decision 2001/1723/EC).

An action for annulment (Art. 230 EC) was brought by Alitalia in the year 2001 with the following claim reasons:

²⁰ Source: reuters (2008) – the world's largest international multimedia news agency; Andrea Giuricin: *Alitalia: Le responsabilità e le soluzioni*, Istituto Bruno Leoni, Italy 2008; Andrea Giuricin e Ugo Arrigo: *Quanto costa ai consumatori il piano di CAI?*, Istituto Bruno Leoni, Torino 2008; Andrea Giuricin: *Una vendita all'italiana*, Istituto Bruno Leoni, Torino 2007.

²¹ State aid: Commission launches in-depth investigation into €300 million loan granted to Alitalia by the Italian State, Brussels, 11th June 2008, p. 4

²² Case T-301/01, *Linee aeree italiane S.p.A. against the Commission of the European Communities*, Action brought on 30 November 2001 by Alitalia.

Action brought on 30 November 2001 by Alitalia - Linee aeree italiane S.p.A. against the Commission of the European Communities (Case T-301/01)

The applicant claims:

- *infringement of Article 233 EC,*
- *infringement of Article 88(2) EC inasmuch as the Commission could not, in the present case, adopt a new decision of content identical to the preceding annulled decision without initiating once again the procedure provided for therein,*
- *breach of the principle of sound administration, legal certainty and legitimate expectations, as well as of the obligation imposed by Article 4(5) of Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 EC, inasmuch as the aforementioned general principles and provision required the Commission to act within two months*
- *breach of the rights of defence of the applicant, given that it was impossible for the applicant to defend itself by participating in the administrative procedure leading to the adoption of the contested act,*
- *breach of the obligation to provide a statement of reasons.*

Commission decision which was held in 2001 was confirmed by CFI as valid.²³

The up to date press release from the European Commission can be seen under point 7.2. of this paper.

7.2. HOW THE THINKING GOES – ANY NEWS FROM BRUSSELS?

The low-cost company Ryanair has taken a number of actions against the European Commission concerning the State aid cases (under Article 232 EC Treaty, any natural or legal person may complain to the Court of Justice (ECJ) that an institution of the Community has failed to address to that person any act other than a recommendation or an opinion).

These cases are:

- Case T-404/07 – Ryanair v Commission (unlawful state aid allegedly granted to Air France by France in form of differentiated airport charges charged by the French airports depending on the destination of the flights).

²³ Court of First Instance in Case T-301/01, PRESS RELEASE No 48/08, 9 July 2008, p. 2

- Case T-423/07 – Ryanair v Commission (unlawful aid granted to Lufthansa and its Star Alliance partners through the exclusive use of Terminal 2 of Munich Airport).
- Case T-433/07 – Ryanair v Commission (unlawful aid granted by Greece to Olympic Airlines and Olympic Airways Services ('OA/OAS')) (subsequently desisted), Ryanair have desisted in their action.
- Case T-441/07 – Ryanair v Commission (unlawful aid in the form of advantages conferred by the Italian State to Volare).
- Case T-442/07 – Ryanair v Commission (unlawful aid in the form of advantages conferred by the Italian State to airlines Alitalia, Air One and Meridiana).

In the Alitalia Case the sale of Alitalia's assets does not constitute a State aid under the EC law if the sale takes place on market terms. Moreover after seriously investigation to all conditions the European Commission has concluded that the €300 million loan was unlawful State aid and incompatible with the common market which mean that the Italian State has to retrieve the State aid from Alitalia (Commission Press release IP/08/1692 of 12th November 2008).²⁴

However there was no response to my message addressed to Italian Ministry of Economy and Finance according to Alitalia, Jean-Louis Colson from European Commission – DG Transport and Energy (Head of Unit A2 – Internal market and competition) gave me the short but concise answer that the Commission is of the opinion that it has investigated each of these cases on its merits (as best it can and has acted reasonably).

²⁴ Commission Press release IP/08/1692, Alitalia: the Commission adopts two State aid decisions, of 12 November 2008.

ABBREVIATIONS USED

AG.....	Aktiengesellschaft (Germany's type of Joint Stock Company)
C.....	Case
CAI.....	Compagnia Aerea Italiana S.p.A.
CFL.....	Court of First Instance
ECJ.....	European Court of Justice
ECR.....	Electronic Court Records
e.g.	Exempli gratia
ELFFA.....	European Low Fares Airline Association
GDP.....	Gross domestic product
EU.....	European Union
GATT.....	General Agreement on Tariffs and Trade
ITL.....	Italian Lira
OJ.....	Official Journal
SGEI.....	Services of General Economic Interest
SpA.....	Società per Azioni (Italy's type of Joint Stock Company)
SMEs.....	Small and medium sized companies
T.....	Judgements of the Court of First Instance
€.....	Euro currency
\$.....	American Dollar

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- [6] *Andrea Giuricin: Alitalia: Le responsabilità e le soluzioni, Istituto Bruno Leoni, Torino 2008.*
- [7] *Andrea Giuricin e Ugo Arrigo: Quanto costa ai consumatori il piano di CAI?, Istituto Bruno Leoni, Torino 2008.*
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[12] Council Recommendation on the Broad Guidelines of the Economic Policies of the Member States and the Community, 2001/483/EC of 15 June 2001.

[13] Court of First Instance in Case T-301/01 - *Alitalia – Linee Aeree Italiane SpA v Commission*, Press release No 48/08, 9 July 2008.

[14] Commission Regulation (EC) No. 69/2001 of 12 January 2001 on the application of Articles 87 and 88 of the EC Treaty to *de minimis* aid.

[15] Commission Regulation (EC) No. 1998/2006 of 15 December 2006 on the application of Articles 87 and 88 of the Treaty to *de minimis* aid.

[16] Commission Press release IP/08/1692, *Alitalia: the Commission adopts two State aid decisions*, of 12 November 2008.

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[32] Case T-433/07 - *Ryanair v Commission*, Order of the Court of First Instance of 30 June 2008, (2008/C 209/120).

[33] Case T-441/07 - *Ryanair v Commission*, Action brought on 29 November 2007, (2008/C 37/43).

[34] Case T-442/07 - *Ryanair v Commission*, Action brought on 30 November 2007, (2008/C 37/44).